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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 185.

ANTHONY W. DIMOCK, PLAINTIFF IN ERROR,

vs.

THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JANUARY 16, 1883.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of New York, in the first judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court, before you, or some of you, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to you, or some of you, the final decree or judgment of said court to be enforced in the suit between the Revere Copper Company of Boston, Massachusetts, plaintiffs, and Anthony W. Dimock, defendant, wherein a right, privilege, and immunity was specially set up and claimed under a statute of the United States, and the decision was against the right, privilege, or immunity specially set up and claimed by said Dimock under such statute, manifest error hath happened, to the great damage of said Anthony W. Dimock, as is said, and as appears by his complaint:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties
2 aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the Justices aforesaid on the second Monday of October next, that the record and proceedings aforesaid being inspected the said Justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-seventh day of December, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOSEPH M. DEUEL, *Clerk.*

I allow this writ to issue.

CHAS. ANDREWS,
Chief Judge of the Court of Appeals of the State of New York.

3 [Endorsed:] U. S. Supreme Court. Anthony W. Dimock, plaintiff in error, against The Revere Copper Company of Boston, Massachusetts, defendants in error. Writ of error.

4 Supreme Court of the United States.

ANTHONY W. DIMOCK, Plaintiff in Error,

vs.

THE REVERE COPPER COMPANY, &c., &c., Defendants in Error.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this second day of January, 1883, before me, the subscriber, personally appeared Joseph W. Mitschke, to me personally known, who makes oath that on the 29th day of December, 1882, he served on Bristow, Peet & Opdyke, Esq'rs, to him known to be the attorneys of The Revere Copper Company, &c., &c., the within-named defendants in error, at their office, number 20 Nassau street, in the city of New York, the within citation, by delivering to and leaving with the person in charge of their office a true copy of the afore-
5 mentioned citation.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL.] JOHN DE WITT WARNER,
Notary Public, N. Y. Co. (122).

[Endorsed:] U. S. Supreme Court. Anthony W. Dimock, plaintiff in error, against The Revere Copper Company, &c., &c., defendants in error. Affidavit of service.

6 UNITED STATES OF AMERICA, *ss:*

To The Revere Copper Company of Boston, Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-three, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York, in the county court-house, New York city, wherein Anthony W. Dimock is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated at the city of Albany, New York, this 18th day of December, 1882.

CHAS. ANDREWS,
Chief Judge of the Court of Appeals of the State of New York.

7 [Endorsed:] U. S. Supreme Court. Anthony W. Dimock, plaintiff in error, against The Revere Copper Company of Boston, Massachusetts, defendants in error. Citation.

8 *Bond for Damages and Costs.*

Supreme Court of the United States.

ANTHONY W. DIMOCK, Plaintiff in Error,
vs.
THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS,
Defendants in Error.

Know all men by these presents that we, William H. Whiton and Edward N. Whiton, both of Piermont, county of Rockland, State of New York, are jointly and severally held and firmly bound unto The Revere Copper Company of Boston, Massachusetts, in the sum of seven thousand dollars, lawful money of the United States of America, to be paid to the said Revere Copper Company of Boston, Massachusetts, their successors or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the 18th day of December, in the year of our Lord one thousand eight hundred and eighty-two.

9 Whereas the above-named Anthony W. Dimock has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the court of appeals of the State of New York in an action wherein the above-named Revere Copper Company of Boston, Massachusetts, is plaintiff and the said Anthony W. Dimock is defendant, which judgment has been remitted to the supreme court of the State of New York to be enforced:

Now, therefore, the condition of the above obligation is such that if the said Anthony W. Dimock shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

WM. HENRY WHITON. [L. S.]
EDWARD N. WHITON. [L. S.]

Sealed and delivered in presence of—
ISAAC P. HUBBARD.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

William H. Whiton, being duly sworn, on his oath says:

10 That he is one of the sureties named in and who executed the within bond; that he is a resident and freeholder and householder within the State of New York, and is worth the sum of fourteen thousand dollars over and above all the debts and liabilities which he owes, or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

WM. HENRY WHITON.

Sworn to before me, this December 18th, 1882.

ISAAC P. HUBBARD,
Notary Public, N. Y. Co.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Edward N. Whiton, being duly sworn, on his oath says: That he is one of the sureties named in and who executed the within bond; that he is a resident and householder within the State of New York, and is worth the sum of fourteen thousand dollars over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

EDWARD N. WHITON.

11 Sworn to before me, this December 18th, 1882.

ISAAC P. HUBBARD,
Notary Public, N. Y. Co.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 18th day of December, 1882, before me personally appeared William H. Whiton and Edward N. Whiton, to me known to be the same individuals described in and who executed the within bond, who severally acknowledged that they executed the same.

[L. S.] ISAAC P. HUBBARD,
Notary Public, N. Y. Co.

A copy.

[SEAL.] PATRICK KEENAN, *Clerk.*

12 [Endorsed:] U. S. Supreme Court. Anthony W. Dimock, plaintiff in error, against The Revere Copper Company of Boston, Massachusetts, defendants in error. Certified copy [of] bond. I approve this bond. (Signed) Chas. Andrews, chief judge court of appeals, N. Y.

13 STATE OF NEW YORK:

COURT OF APPEALS, CLERK'S OFFICE.

I, Edwin O. Perrin, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of The Revere Copper Company, &c., appellant, *vs.* Anthony W. Dimock, respondent, with the original on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this 20 day of December, 1882.

[Seal New York Court of Appeals.]

E. O. PERRIN, *Clerk.*

14 Court of Appeals.

THE REVERE COPPER COMPANY, Appellant,

vs.

ANTHONY W. DIMOCK, Respondent.

David J. H. Wilcox, for appellant.
Geo. Putnam Smith, for respondent.

EARL, J.:

On the 13th day of January, 1874, the plaintiff commenced an action against the defendant by personal service of process upon the promissory notes in the superior court of Massachusetts, which was a court of general jurisdiction. The defendant appeared by an attorney and answered, and that action was continued from term to term to the January term, 1875, when, upon being called, he suffered default. Thereafter on the first day of April, 1875, judgment was rendered and entered against him for upwards of $3,500, besides costs.

15 After the commencement of that action, in June, 1874, the defendant was adjudicated a bankrupt upon a petition filed against him, and on the 26th day of March, 1875, five days before the entry of the judgment against him, he was discharged by the bankrupt court from all his debts.

This action was commenced upon that judgment, in March, 1879, and the only defense interposed by the defendant was the discharge in bankruptcy. The trial judge held that the discharge furnished no defense because the judgment was subsequent thereto. But upon appeal to the general term it was held that the discharge was a bar to the action, and a new trial was granted.

We are of opinion that the trial judge was right. The proceedings in bankruptcy did not oust the Massachusetts court of jurisdiction of the action. The action could have been stayed upon the application of the bankrupt, but, unless so stayed, it could

16 proceed to a valid judgment. (U. S. R. S., sec. 5106; Eyster *vs.* Gaff, 91 U. S. R., 521; Duryee *vs.* Becker, 9 N. B. R., 508; Palmer *vs.* Merrill, 57 Me., 26; Stone *vs.* National Bank, 39 Ind., 284.)

The discharge no more rendered the judgment subsequently entered void than would payment or release of the debt during the pendency of the action. To defeat the entry of a valid judgment payment, release, or discharge, whether before the commencement of the action or during its pendency, must be availed of as a defense.

It is not a material circumstance that the defendant's default was taken before the discharge. The default was not the final adjudication in the action and not a judgment constituting an estoppel. The estoppel in such a case comes when the final judgment is entered and the record is made up. (Webb *vs.* Buckelew, 82 N. Y., 555.) The judgment speaks and concludes the parties as of that date.

Here, on the first day of April, 1875, it was adjudged that
17 the defendant owed the plaintiff the amount recovered, and that at that date he had no defense to the action. The judgment imports absolute verity, and cannot be contradicted by proof that the debt for which it was entered was not justly due. When sued upon a judgment the defendant can no more prove a discharge in bankruptcy granted before its entry than he could be allowed to prove payment or a release pending the action. So far as I have been able to discover, it has uniformly been held that a discharge in bankruptcy is no bar to an action upon a judgment subsequently recovered. Mechanics' Bank *vs.* Hazard, 9 Johns, 392; Desoby *vs.* Morange, 18 Johns, 336; Stewart *vs.* Green, 11 Paige, 534; Rudge *vs.* Rundle, 1 T. & C., 649; Hollister *vs.* Abbott, 31 N. H., 442; Ballany *vs.* Woodson, 4 Geo., 475; Wilkins *vs.* Morange, 27 Me., 438; Rees *vs.* Butler, 18 Mo., 173. The case of Wolf *vs.* Stix, 99 U. S. R., 1, was decided under the statute and practice of Tennessee applicable to the case, and is not in conflict with the cases last cited. And the cases which hold that a judgment obtained after the ad-
18 judication in bankruptcy upon a debt existing before — is wiped out by a subsequent discharge in bankruptcy do not aid the defendant. (Monroe *vs.* Upton, 50 N. Y., 593; Clark *vs.* Rawling, 3 N. Y., 216.) In these cases the general rule that debts are absolutely merged in the judgment recovered upon them, and that the judgment becomes a new debt, was not applied. But for the purpose of the cases then in hand it was held that the old debts were not merged, and that the judgments were merely the old debts in a new form, and that a discharge of the old debts, therefore, discharged the judgments, which simply represented them. In this case it is not necessary to consider whether or not the old debts were merged in the Massachusetts judgment, so that that judgment constituted an entirely new debt. It is the estoppel, furnished by the judgment, recovered subsequently to the discharge, which stands in the defendant's pathway. That closes his mouth to allege the discharge.

19 It matters not that the Massachusetts judgment is a foreign judgment. Under the Federal Constitution it is entitled to full faith and credit, and it is just as effectual as an adjudication and estoppel as if it had been rendered here. (Hampton *vs.* McConnell, 3 Wheat., 234; Dobson *vs.* Pierce, 12 N Y., 156.)

The defendant was not without a remedy. He could have applied to the Massachusetts court to open his default and permit him to set up his discharge; and if, for any reason, that remedy was not open to him, he could have commenced an action against the plaintiff in equity to set aside or vacate that judgment or to perpetually restrain its collection. In such an action, however, he would have been obliged to prove fraud, imposition, mistake, or some other ground for equitable interference. (Smith *vs.* Nelson, 62 N. Y., 286.)

It would not have been sufficient for him to show that the
20 debt for which the judgment was entered had been discharged or that the judgment was unjust, but he would have been obliged to excuse his omission to avail himself of his defense and to

move for relief in the original action, and relief would have been administered to him, if at all, in view of all the circumstances, and based upon the grounds which authorize equitable interference in such cases.

And the defendant, under our system of practice, instead of commencing such an action against the plaintiff, could have claimed the same relief in this action. But he would, in that case, have been obliged to allege in his answer and prove the same facts which he would have been required to allege and prove if he had instituted an action for the same relief. Here no such relief was sought. The discharge was relied upon simply as a defense to the action, and no facts were alleged or proved which entitled the defendant to equitable relief against the judgment.

21 The order of the general term should be reversed and the judgment of the trial term should be affirmed, with costs.

"All concur except Tracy, J., absent."

A copy. H. E. SICKELS, *Reporter*, Per C.

[Endorsed:] Revere Copper Company *ag'st* Dimock. Opinion. Earl, J. 1.75.

22 *The Answer of the Justices of the Supreme Court of the State of New York, in and for the First Judicial Department.*

The record and proceedings aforesaid, together with things concerning the same, we certify under the seal of our said court to the justices of the Supreme Court of the United States within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Dated New York, December 28, 1882.

By the court:

[SEAL.] WM. A. BUTLER, *Clerk.*

23 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 10th day of October, in the year of our Lord one thousand eight hundred and eighty-two, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge presiding.

Remittitur Oct. 12th, 1882.

E. O. PERRIN, *Clerk.*

24 REVERE COPPER COMPANY OF BOSTON, MASS., Appellant,
ag'st
ANTHONY W. DIMOCK, Respondent.

Be it remembered that on the 20th day of June, in the year of our Lord one thousand eight hundred and eighty-one, Revere Copper Co. of Boston, Mass., the appellant in this action, came here

into the court of appeals, by Bristow, Peet, Burnett and Opdyke, its attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York.

And Anthony W. Dimock, the respondent in said action, afterwards appealed in said court of appeals, by George Putnam Smith, his attorney.

25 Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. David J. H. Wilcox, of counsel for the appellant, and by Mr. George Putnam Smith, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the general term of the supreme court appealed from in this action to this court be, and the same is hereby, reversed, and judgment of trial term affirmed, with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be reversed, &c., as aforesaid.

And hereupon as well the notice of appeal and return
26 thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Oct.* 12*th*, 1882.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] E. O. PERRIN, *Clerk.*

27 *Summons.*

N. Y. Supreme Court, City and County of New York.

REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS, Plaintiff,
against
ANTHONY W. DIMOCK, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer,

judgment will be taken against you by default for the relief demanded in the complaint.

Dated March 3rd, 1879.

BRISTOW, PEET, BURNETT & OPDYKE,
Plaintiff's Attorneys.

Office and post-office address: No. 20 Nassau street, N. Y. city.

28 *Complaint.*

N. Y. Supreme Court, City and County of New York.

REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS,
vs.
ANTHONY W. DIMOCK.

The complaint of the above-named plaintiff respectfully shows to this court:

I. That said plaintiff is and at the times hereinafter mentioned was a corporation duly organized under the laws of the Commonwealth of Massachusetts.

II. That on or about the 13th day of January, 1874, the plaintiff commenced an action in the superior court of the Commonwealth of Massachusetts, within and for the county of Suffolk, against the defendant by the issue of a writ of attachment against the goods and estate and body of said defendant, which said writ was duly served on said defendant, and his body arrested, and a summons to appear in said action was delivered to him personally.

III. That such proceedings were thereupon had that on the 1st day of April, 1875, the plaintiff duly recovered judgment in said action against the defendant for the sum of thirty-five hundred and sixty-three $\frac{43}{100}$ dollars, damages, and thirty-one and $\frac{72}{100}$ dollars, costs of suit, which judgment was upon that day duly entered.

IV. That no part of said judgment has been paid, and the whole thereof is now due and payable to plaintiff.

Wherefore the plaintiff demands judgment against the de-
29 fendant for the sum of thirty-five hundred and ninety-five dollars and fifteen cents, with interest from April 1st, 1875, together with the costs of this action.

BRISTOW, PEET, BURNETT & OPDYKE,
Plaintiff's Attorneys.

20 Nassau street, N. Y. city.

Which complaint was duly verified.

Answer.

Supreme Court, City and County of New York.

THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS,
ag'st
ANTHONY W. DIMOCK.

The defendant above named answers the plaintiff's complaint as follows:

I. He has no knowledge or information sufficient to form a belief as to the matters set forth in the first, third, and fourth paragraphs of said complaint.

II. For a second and separate answer the defendant saith:

1. That on the twenty-sixth day of March, 1875, the district court of the United States for the district of Massachusetts duly granted unto this defendant a discharge in bankruptcy, in the words following, to wit:

District Court of the United States, District of Massachusetts.

Whereas Anthony W. Dimock, of Shelburne Falls, in said district, has been adjudged a bankrupt under the act of Congress es-
30 tablishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf: It is therefore ordered by the court that said Anthony W. Dimock be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the twenty-third day of June, A. D. eighteen hundred and seventy-four, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at Boston, in the said district, this twenty-sixth day of March, A. D. 1875.

[L. S.] JOHN LOWELL, *Judge.*

2. That the supposed indebtedness upon which the alleged judgment recovered by plaintiff is founded accrued before the granting of such discharge, and before the 23d day of June, 1874. That said indebtedness is one that was provable against the estate of the defendant in the proceedings in which said discharge was granted, and is not such an indebtedness as is excepted by said discharge.

Wherefore defendant asks that said complaint be dismissed, with costs.

GEO. PUTNAM SMITH,
Defendant's Attorney.

N. Y., March 13, 1879.

Which answer was duly verified.

31 N. Y. Supreme Court.

THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS,
against
ANTHONY W. DIMOCK.

This cause came to trial on the 13th day of June, 1879, before the Hon. George C. Barrett, one of the justices of this court, without a jury.

The plaintiff, to maintain the issues on his part, introduced in evidence an exemplified copy of a judgment roll as follows:

COMMONWEALTH OF MASSACHUSETTS:

I, Lincoln F. Brigham, chief justice of the superior court of the Commonwealth of Massachusetts, do certify that Joseph A. Willard, Esq., whose signature is affixed to the papers hereunto annexed, is clerk of said superior court within and for the county of Suffolk, and hath the keeping of the files, records, and proceedings of said court within and for said county; also of the late court of common pleas within and for said county, and of the late superior court of the county of Suffolk aforesaid; that he is, by law, the proper person to make out and to certify copies of the files, records, and proceedings of said several courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, being numbered 1, 2, and 3 of the files, records, and proceedings of the said superior court, are in due form.

In testimony whereof I have hereunto set my hand and
32 caused the seal of said court to be hereunto affixed, this eight day of March, in the year of our Lord one thousand eight-hundred and seventy-eight.

[L. S.] LINCOLN F. BRIGHAM,
Chief Justice of the Superior Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our superior court held at Boston, for and within our county of Suffolk, it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

To the sheriffs of our several counties or their deputies, Greeting:

[SEAL.] We command you to attach the goods or estate of A. W. Dimock, now commorant at Shelburne Falls, in our county of Franklin and Commonwealth aforesaid, to the value of six thousand dollars, and for want thereof to take the body of the said A. W. Dimock (if he may be found in your precinct) and him safely keep, so that you have him before our justices of our superior court next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of April next, then and there in our said court to answer unto the Revere Copper Company, a corporation duly organized under the laws of the said Commonwealth, and having its principal and usual place of business at Boston, in our county of Suffolk aforesaid, in an action of contract.

1st Count. And plaintiff says that the Atlantic Mail Steamship Company, by A. W. Dimock, president, made a promissory note, a copy of which, with the endorsements thereon, is hereto an-
33 nexed, marked "A," payable to the order of H. J. Quinan,

treasurer; and said H. J. Quinan, treasurer, indorsed the same to the defendant, and the defendant indorsed the same to the plaintiff; and payment of said note was duly demanded of the said Atlantic Mail Steamship Company, who neglected to pay the same, and due notice of its non-payment was given to the said H. J. Quinan, treasurer, and to the said A. W. Dimock, and the said A. W. Dimock owes the plaintiff the amount of said note and interest thereon.

2d Count. And plaintiff says that the Atlantic Mail Steamship Company, by A. W. Dimock, president, made a promissory note, a copy of which, with the indorsements thereon, is hereto annexed, marked "B," payable to the order of H. J. Quinan, treasurer, and said H. J. Quinan indorsed the same to the defendant, and the defendant indorsed the same to the plaintiff; and payment of said note was duly demanded of the said Atlantic Mail Steamship Company, who neglected to pay the same, and due notice of its non-payment was given to the said H. J. Quinan, treasurer, and to the said A. W. Dimock, and the said A. W. Dimock owes the plaintiff the amount of said note and interest thereon.

3d Count. And the plaintiff says the defendant owes it the sum of three thousand and eighty-nine dollars and forty-six cents for the balance found due the plaintiff by the parties on accounting together, together with interest thereon from Dec. 19, 1872, the date of said accounting together, this count being for the same cause of action embraced on the 1st and 2d counts preceding.

34 "A."

$1,544.73. NEW YORK, *Dec.* 19, 1872.

Thirty days after date we promise to pay to the order of H. J. Quinan, treasurer, fifteen hundred and forty-four dollars and seventy-three cents, at office of the company, No. 5 Bowling Green.

Value received.

No. 2750. Due Jan. 18–21, '73.

THE ATLANTIC MAIL S. S. CO.,
By A. W. DIMOCK, *Pres't.*

Indorsed: "H. J. Quinan, treasurer. A. W. Dimock."

"B."

$1,544.73. NEW YORK, *Dec.* 19, 1872.

"Sixty days after date we promise to pay to the order of H. J. Quinan, treasurer, fifteen hundred and forty-four dollars and seventy-three cents, at the office of the company, No. 5 Bowling Green."

Value received.

No. 2671. Due Feb. 17–20, '73.

THE ATLANTIC MAIL S. S. CO.,
By A. W. DIMOCK, *Pres't.*

Indorsed: "H. W. Quinan, treasurer. A. W. Dimock."

To the damage of the said plaintiff (as it says) the sum of six thousand dollars, which shall then and there be made to appear with

other due damages. And have you there this writ, with your doings therein.

Witness Lincoln F. Bringham, Esquire, at Boston, the thirteenth day of January, in the year of our Lord one thousand eight hundred and seventy-four.

JOS. A. WILLARD, *Clerk.*

35 Upon which writ is the following return by the officer who served the same:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

JANUARY 14, 1874.

I, S. C. Darling, in behalf of the plaintiffs named in the annexed writ, do on oath declare that said plaintiffs have a good cause of action against the defendant therein named and a reasonable expectation of recovering a sum amounting to twenty dollars, exclusive of all costs which have accrued in any former action, and that I believe, and have reason to believe, that the said defendant, A. W. Dimock, has property not exempt from being taken on execution which he does not intend to apply to the payment of the plaintiff's claim, and that I believe, and have reason to believe, that he intends to leave the State so that execution, if obtained, cannot be served upon him.

SAMUEL C. DARLING.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

JANUARY 14, 1874.

Personally appeared the above-named Samuel C. Darling before me and made oath to the truth of the above affidavit by him subscribed, and I certify that I am satisfied the same is true. And satisfactory cause having been shown, I authorize the arrest of the said defendant, if his arrest is authorized by law, to be made after sunset.

J. B. RICHARDSON,
Master in Chancery.

FRANKLIN, *ss:*

By virtue of the within precept I have arrested the body of the within-named A. W. Dimock, and have him before Samuel D. Bardwell, Esq., for examination, and upon the certificate of said
36 magistrate the said Dimock is discharged. And on the same day I delivered to him in hand a summons for his appearance at court as within directed.

H. S. SWAN,
Deputy Sheriff.

Fees:

Service	$1 00
Travel, 125 miles	3 50
	$4 50

Paid Jan. 15, 1874.

H. S. SWAN,
D. Sheriff.

At the April term, 1874, the plaintiff corporation appeared, by Samuel C. Darling, Esquire, its attorney, and entered the above action; and the defendant appeared, by Samuel T. Field, Esquire, his attorney. And the plaintiff gives notice that it desires a trial by jury in said action. And the defendant comes, and for answer says: He denies all the allegations of the plaintiff made in his declaration and in each count thereof. He denies that the plaintiff is the owner of said notes, or either of them. He denies that he endorsed them, or either of them, to the plaintiff, or to any other person; and if the plaintiff shall prove that defendant put his name upon the back of said notes, or either of them, he says he shall prove that he did it not as endorser; and that, not being payer of the note or notes and not the holder of them, he, a long time after said notes were made, put his name on them without any consideration.

And he further says that Mrs. Helen M. Dimock is the owner of said notes, and that they have been paid; and also that the action was brought without the authority of said Mrs. Dimock, and without her knowledge.

And thence the action was continued from term to term to the January term, 1875, when the defendant, though called, does not appear, but makes default on the twenty-second day of said
37 January; and on the first day of April, A. D. 1875, it is considered by the court that the said Revere Copper Company recover of the said Dimock the sum of thirty-five hundred and sixty-three dollars and forty-three cents, damages, and thirty-one dollars and seventy-two cents, costs of suit.

All and singular which premises we have held good by the tenor of those presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Lincoln F. Brigham, Esquire, chief justice of our superior court, at Boston, this eighth day of March, A. D. 1878.

JOS. A. WILLARD, *Clerk.*

Plaintiff also read in evidence an extract from the Revised Statutes of Massachusetts, showing that the court wherein said judgment was rendered was a court of general jurisdiction.

Plaintiff rests.

The defendant's counsel introduced in evidence a duly certified copy of defendant's discharge in bankruptcy as follows:

District Court of the United States, District of Massachusetts.

Whereas Anthony W. Dimock, of Shelburne Falls, in said district, has been adjudged a bankrupt under the acts of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf: It is therefore ordered by the court that said Anthony W. Dimock be forever discharged from all debts and claims which by said acts are made provable against his estate, and which ex-

38 isted on the twenty-third day of June, A. D. eighteen hundred and seventy-four, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said acts excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at Boston, in the said district, this twenty-sixth day of March, A. D. eighteen hundred and seventy-five.

[L. S.] JOHN LOWELL, *Judge.*

I, deputy clerk of the district court of the United States for the district of Massachusetts, hereby certify that I have compared the within copy of the original certificate of discharge with said original certificate of discharge of record and on file in the office of the clerk of said court, and that the same is a correct copy thereof, and of the whole of said original certificate.

In witness whereof I have hereunto subscribed my name and affixed the seal of the said court, this twenty-second day of May, A. D. 1879.

[L. S.] F. S. LITTLE,
Deputy Clerk.

Defendant rests.

39 The court found as follows:

Supreme Court.

THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS, Plaintiff,
against
ANTHONY W. DIMOCK, Defendant.

This action having been heretofore tried before the court without a jury, at circuit, the court hereby makes and files the following as its finding of fact and conclusions of law herein:

As Findings of Fact.

First. That the plaintiff is, and at the times hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts.

Second. That on or about the 13th day of January, 1874, The Revere Copper Company of Boston, Massachusetts, the plaintiff herein, commenced an action in the superior court of the Commonwealth of Massachusetts, within and for the county of Suffolk, a court of general jurisdiction, against Anthony W. Dimock, the defendant herein, by the issue of a writ of attachment against the goods, estate, and body of the said defendant, and which said writ was duly served on said defendant, and the summons to appear in said action was duly served upon him personally, and that the said defendant thereafter duly appeared in said action by attorney; that the cause of action was an endorsement of said Dimock of two

40 promissory notes made in the city of New York to the order of plaintiff by the Atlantic Mail Steamship Company, and dated December 19, 1872.

Third. That on or about June 23, 1874, the said defendant, Anthony W. Dimock, filed a petition in bankruptcy, and was duly adjudicated a bankrupt, in the district court of the United States for the district of Massachusetts, and that such proceedings were thereafter had that, on or about March 26, 1875, the said Dimock was discharged from all debts and claims provable against his estate, and which existed on the 23d day of June, 1874.

Fourth. That such proceedings were had in the aforesaid action in the superior court of the Commonwealth of Massachusetts that on or about April 1st, 1875, the plaintiff duly recovered judgment in said action against the defendant for the sum of three thousand five hundred and ninety-five $\frac{15}{100}$ dollars ($3,595.15), and that said judgment was upon that day duly entered.

Fifth. That no part of said judgment has been paid, and the whole thereof is now due and payable to the plaintiff.

As Conclusions of Law.

I. That the said proceedings in bankruptcy are no bar to the present action, and constitute no defense herein.

II. That the plaintiff should have judgment against the defendant for the sum of three thousand five hundred and ninety-five $\frac{15}{100}$ dollars ($3,555.15), with interest from April 1st, 1875, amounting to one thousand one hundred and forty-two $\frac{96}{100}$ dollars ($1,142.96), making in all four thousand seven hundred and thirty-eight $\frac{11}{100}$ dollars ($4,738.11), together with the costs of this action, to be taxed, and an allowance, in addition to costs, amounting to the sum of seventy-five dollars.

41 Supreme Court, City and County of New York.

THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS,
Plaintiff,
against
ANTHONY W. DIMOCK, Defendant.

This action having been brought to trial by the court, a trial by jury having been duly waived, and a decision therein having been rendered for the plaintiff, wherein it was concluded that the plaintiff should have judgment against the defendant for four thousand seven hundred and thirty-eight $\frac{11}{100}$ dollars ($4,738.11), together with the costs of this action, to be taxed, and an allowance, in addition to costs, amounting to the sum of seventy-five dollars; and said decision having been duly filed, on motion of Bristow, Peet, Burnett & Opdyke, of counsel for the plaintiff, it is adjudged that the said plaintiff recover of the said defendant the sum of four thousand seven hundred and thirty-eight $\frac{11}{100}$ dollars ($4,738.11), together with one hundred and seventy $\frac{62}{100}$ dollars ($170.62), costs and allowance, amounting in all to the sum of four thousand nine hundred and eight $\frac{73}{100}$ dollars ($4,908.73).

42 N. Y. Supreme Court.

THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS,
Plaintiff,
against
ANTHONY W. DIMOCK, Defendant.

Please to take notice that the defendant herein excepts to the first of the conclusions of law of the court upon the trial of this action without a jury.

That he also excepts to the second of said conclusions of law.

Yours, &c.,

GEO. PUTNAM SMITH,
Defendant's Attorney.

New York, 28th October, 1879.

To Bristow, Peet, Burnett & Opdyke, Esq'r's, plaintiff's attorneys.

N. Y. Supreme Court, City and County of New York.

THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS,
Plaintiff,
against
ANTHONY W. DIMOCK, Defendant.

SIRS: Please take notice that the defendant, Anthony W.
43 Dimock, appeals to the general term of this court, to be held in and for the first department, from the judgment entered in this action on the 22d day of October, 1879, in the office of the clerk of the city and county of New York, in favor of The Revere Copper Co., the plaintiff, and against the defendant, in and by which it was adjudged that the plaintiff should have judgment against the defendant for four thousand seven hundred and thirty-eight dollars and eleven cents, together with the costs of this action, to be taxed, and an allowance, in addition to costs, amounting to the sum of seventy-five dollars, and that the defendant appeals from the whole of the said judgment ordered against him on the said 22d day of October, 1879, and from every part thereof.

Yours, &c., GEO. PUTNAM SMITH,
Attorney for Defendant.

Dated New York, October, 1879.

To Bristow, Peet, Burnett & Opdyke, Esq'r's, plaintiff's attorneys, 20 Nassau street.

HUBERT O. THOMPSON, ESQ., *Clerk.*

The opinion of Justice Barrett was as follows:

Circuit. Part III.

REVERE COPPER COMPANY *against* ANTHONY W. DIMOCK.

Action upon a judgment recovered in a court of general jurisdic-

tion in the State of Massachusetts. Defence, a discharge in bankruptcy granted five days before such judgment was rendered.

The judgment was for the amount of certain promissory notes existing on the day on which the petition for adjudication was filed.

44 Mr. David J. H. Wilcox, for the plaintiff.
Mr. George Putnam Smith, for the defendant.

BARRETT, J.:

The Massachusetts court had complete jurisdiction. The parties were regularly before it, and the subject-matter was an ordinary action upon certain promissory notes. The judgment there pronounced is under the circumstances conclusive. (Const., Art. 4, § 1; Mills *v.* Duryea, 7 Cranch, 481; Hampton *v.* McConnel, 3 Wheat., 234; Dobson *v.* Pearce, 12 N. Y., 156.)

The defendant says, in effect, that he had a good defence, of which he omitted to avail himself. With that we have nothing to do. The court had jurisdiction, whether the defendant was discharged or not. It was for the defendant to plead his discharge. He might as well say that the court had no jurisdiction because the notes had been paid and cancelled, or because the plaintiff had executed a release under seal.

The grounds upon which judgments recovered prior to the discharge (on provable claims) are placed in the same situation as the original demand is, that the defendant had no opportunity to plead the discharge. Such was the doctrine of Clark *v.* Rowling, 3 Comst., 224. In that case, however, Hurlburt, J., referred with approval to the opposite doctrine (as enunciated in Stewart *v.* Green, 11 Paige, 534), where the judgment follows the discharge.

The chancellor, in Stewart *v.* Green, intimated that the discharge obtained before the recovery of the judgment could not avail the defendant while such judgment remained in full force, and that he ought to have pleaded such discharge in the action at law. "And this," says Hurlburt, J., "may be conceded where the defendant has an opportunity for that purpose."

45 The discussion as to the characteristics of a judgment—whether a new debt or but a partial merger—is therefore unprofitable.

It comes to this. The notes were released, but the defendant waived that defence. His remedy before judgment was to plead *puis darein*. His remedy since was to apply to be let in. This he has not done, but has exhibited gross laches. The fallacy of the defence consists in the idea that the court had no power to grant the judgment. It had power, because, as we have seen, it possessed general jurisdiction also of the parties and the subject-matter.

The more we reflect upon the subject the clearer becomes the conviction that this is simply an ingenious attempt to set up, in an action on the judgment, a defence to the original demand. The authorities, too, in sister States, as well as in our own, are explicit against the defendant's position. (Mechanics' Bank *v.* Hazard, 9 Johns, 392; Stewart *v.* Green, *supra;* Rudge *v.* Rundle, 1 T. & C.,

649; Medbury *v.* Swan, 46 N. Y., 203, and cases there cited by Allen, J.; Hollister *v.* Abbott, 31 N. Y., 442; Bellamy *v.* Woodson, 4 Geo., 175; Rees *v.* Butler, 18 Mo., 173.)

There must be judgment for the plaintiff.

46 At a general term of the supreme court of the State of New York for the first department, held at the county court-house in the city of New York on the 1st day of April, 1881.

Present: Hon. Noah Davis, P. J., Brady and Daniels, JJ.

THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS, Resp'd't,
against
ANTHONY W. DIMOCK, App'l't.

The appeal from the judgment entered in this action on the 22d day of October, 1879, for $4,813.11, damages and costs, having been heard at the general term, it is now, on motion of George Putnam Smith, counsel for appellant, after hearing D. J. H. Wilcox, counsel for respondent—

Adjudged that the said judgment be reversed, and a new trial ordered, with costs to appellant to abide the event.

WILLIAM A. BUTLER.

47 *Notice of Appeal to the Court of Appeals.*

Supreme Court. General Term. First Department.

REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS,
against
ANTHONY W. DIMOCK.

GENTLEMEN: Please take notice that the above-named plaintiff hereby appeals to the court of appeals of the State of New York from the certain order of the general term of the first department of the supreme court of said State in this action, entered in the office of the clerk of the city and county of New York on the second day of April, 1881, reversing the judgment of the special term of said court entered therein in favor of the plaintiff herein, and against the defendant, on October 22d, 1879, for the sum of $4,738.11, together with the costs, to be taxed, and an allowance in addition to costs of seventy-five dollars, and directing a new trial, with costs to appellant to abide the event, and from each and every part of said order. And the appellant hereby consents that if the said order of the said general term is affirmed by the said court of appeals, judgment absolute shall be rendered against the above-named plaintiff and appellant.

Yours, &c.,

BRISTOW, PEET, BURNETT & OPDYKE,
Attorneys for Plaintiff and Appellant.

Dated New York, June 13, 1881.

To Geo. Putnam Smith, Esq., attorney for defendant and respondent.

To William A. Butler, Esq., clerk of the city and county of New York.

48 STATE OF NEW YORK, } ss:
City and County of New York, }

I, William A. Butler, clerk of the supreme court in and for said county, do hereby certify that the foregoing consists of certified copies of the notice of appeal, the order appealed from, and the papers on which the court below acted in making said order.

In witness whereof I have hereunto set my hand and affixed my official seal this 18th day of June, A. D. 1884.

[L. S.] WILLIAM A. BUTLER, *Clerk.*

49 At a special term of the supreme court, held at the court-house in the city of New York, this 13th day of October, 1882.

Present: Hon. G. C. Barrett, J.

REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS, Plaintiff,
vs.
ANTHONY W. DIMOCK, Defendant.

The plaintiff above named having appealed to the court of appeals from the order of the general term of this court, bearing date April 2, 1881, reversing the judgment of the special term of this court duly entered herein with the clerk of this court on October 22, 1879, and the court of appeals having reversed the said order

50 and affirmed the said judgment, with costs:

Now on reading and filing the remittitur from the court of appeals, and on motion of Bristow, Peet & Opdyke, plaintiff's attorneys, it is hereby ordered that the judgment of the court of appeals be, and the same hereby is, made the judgment of this court, and that the plaintiff have execution thereon.

Filed Oct. 13, 1882.

51 N. Y. Supreme Court.

REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS, Plaintiff,
vs.
ANTHONY W. DIMOCK, Defendant.

The judgment entered herein in favor of the plaintiff, The Revere Copper Company of Boston, Massachusetts, and against the defendant, Anthony W. Dimock, on October 22, 1879, for $4,908.73, having been affirmed by the court of appeals, now on motion of Bristow, Peet and Opdyke, attorneys for the plaintiff, it is adjudged that the said judgment be, and the same hereby is, affirmed, with one hundred and eighteen $\frac{78}{100}$ dollars ($118.78) costs to the above-named plaintiff.

N. Y., November 8, 1882

Filed Nov. 8, 1882, 1 h. 45 m.

Endorsed on cover: New York supreme court. No. 185. Anthony W. Dimock, plaintiff in error, *vs.* The Revere Copper Company of Boston, Mass. Filed 16th January, 1883.

117-559

SUPREME COURT OF THE UNITED STATES,

October Term, 1885.

No. 185.

ANTHONY W. DIMOCK,

Plaintiff in Error,

against

THE REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GEO. PUTNAM SMITH,

For Plaintiff in Error.

Supreme Court of the United States.

In Error to the Supreme Court of the State of New York.

ANTHONY W. DIMOCK, Pltff. in error against THE REVERE COPPER CO., of Boston, Massachusetts. Deft. in error.	**No. 185.**

Brief for Plaintiff in Error.

THE CASE.

On March 3rd, 1879, an action was begun in the Supreme Court of the State of New York, by the Revere Copper Company, against Anthony W. Dimock, based upon a judgment for $3,595.15 which they had recovered against him in the Superior Court of Massachusetts, April 1st, 1875. Upon the trial of the cause in the New York Court the Revere Company put in evidence an exemplified copy of the judgment record in Massachusetts (Record p. 11) by which it appeared that on January 13th, 1874, they had begun suit against Mr. Dimock upon two promissory notes which had been endorsed by him. That process was personally served upon him and that he

appeared in the action. That on the 22d day of January, 1875, his default was taken, and that on the first day of April, 1875, judgment was rendered against him. On the other hand Mr. Dimock proved (Record page 15) that on the 26th day of March, 1875, he received his discharge in bankruptcy from all debts provable against his estate and existing June 23rd, 1874, on which day he was adjudicated a bankrupt.

The Justice before whom the cause was tried ruled that the proceedings in bankruptcy were no bar to the action upon the Massachusetts judgment and constituted no defence therein. (Record p. 16)—and gave judgment to the present defendants in error. The General Term of the New York Supreme Court reversed this judgment and ordered a new trial.

(Record p. 19.) Revere Copper Company, vs. Dimock, N. Y. Supreme Court, Rep. (4 Hun.) 382.

The Court of Appeals reversed the order of the General Term and sustained the judgment of the Trial Term— (Record p. 8.) Revere Copper Co., v. Dimock, 90 N. Y., 33.

ASSIGNMENT OF ERRORS.

1. The State Court erred in not holding that the discharge in bankruptcy pleaded by Mr. Dimock, was a complete defence to the suit upon the Massachusetts' judgment.

POINTS.

I.

The suit in the New York Supreme Court was brought to collect the amount of a judgment which had been recovered upon certain promissory notes which were claims provable against Mr. Dimock's

estate, June, 23rd, 1874, on which day he was adjudicated a bankrupt, and therefore within the scope of section 5119 of the United States Bankruptcy Act of 1867 which provides that "a discharge in bankruptcy duly granted shall release the bankrupt from all debts, claims, liabilities and demands which are or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting forth a full copy of the same in its terms as a full and complete bar to all suits brought or any such claims, liabilities or demands. The certificate shall be conclusive evidence of the fact and regularity of such discharge."

It is immaterial that the *form* of the debt was changed after the institution of the bankruptcy proceedings, so that instead of a simple contract debt it became a judgment.

"Although a judgment is for some purposes considered as a merger of the former and as constituting a new cause of action, yet, when the essential rights of parties are influenced by the nature of the original contract, the Court will look into the judgment for the purpose of ascertaining what such original cause was."

Betts vs. Bagley, 12 Pickering, 571.
Clark vs. Rowling, 3 N. Y., 216.

In New York a judgment is not a new debt but merely a new form of an old debt.

Wyman vs. Mitchell, 1 Cowen, 316.
Clark vs. Rowling, 3 N. Y., 220.

If, during the pendency of proceedings in bankruptcy, a provable claim against the bankrupt's estate becomes transformed into a judgment, it will nevertheless be extinguished by a subsequent discharge in bankruptcy.

Monroe vs. Upton, 50 N. Y., 593.
Ocean Bank vs. Olcott, 46 N. Y., p. 22.
Arnold vs. Olliver, 2 N. Y., Civil Procedure Rep., 457.
Dewey vs. Meyer, 72 N. Y., p. 75.

The same doctrine prevails in many of the States, while in Maine-Massachusetts, New Hampshire, Missouri and other States, a judgment is regarded as a new debt, and therefore, if recovered after a petition in bankruptcy, it would not be affected by a subsequent discharge.

But that a judgment on a provable claim is barred by a subsequent discharge in bankruptcy being the established law of New York, when Mr. Dimock was sued in that State upon the Massachusetts judgment, he was entitled to the benefit thereof.

If, therefore, the judgment had been entered before, instead of five days after the plaintiff in error obtained his discharge in bankruptcy, no action could have been brought in New York upon that judgment to which the discharge would not have been a complete defence.

II.

The fact that the present claim was transformed into a judgment after the discharge was granted, does not take it out of the operation of the rule stated in Point I. It being settled law in New York that a judgment is not a new debt but merely a new form of an old debt, it was extinguished by the discharge in bankruptcy. Any other rule would narrow section 5,119 of the Bankruptcy Act so that it in effect would read that a discharge should relieve the bankrupt from all debts, claims &c. *provided they should not thereafter assume the form of a judgment.*

But it is claimed that the plaintiff in error is concluded by the judgment entered April 1st. 1875. The opinion of the General Term of the New York Supreme Court on that subject is as follows:

"Per Curiam:

"This action was based upon a judgment entered in the Superior Court of the Commonwealth of Massauchusetts, within the County of Suffolk, by the plaintiff against the defendant, on the 1st of April, 1875. The defendant pleaded his discharge in bankruptcy, granted by the United States District Court of that State on the 26th of March, 1875. The Court below objected to the discharge on the proposition that the Court in Massachusetts had jurisdiction of the whole subject matter, and that it was the duty of the defendant to have pleaded his discharge in that State.

It will be perceived, upon referring to the dates, that the judgment was entered five days after the discharge was obtained, that paper bearing date the 26th of March, 1875. Upon an examination of the record, however, it is discovered that the judgment was predicated on a default taken in the January term, 1875, at which time the defendant had not obtained his discharge; and the plaintiffs could have entered judgment had they chosen to adopt that course. They did not do so, however, and the judgment was not perfected until the April following. The defendant, having made default, was not then in a condition to interpose his plea of bankruptcy *puis darrein continuance*, because of that fact, and application to the Court would have been necessary to set that default aside. It was in effect, or equivalent to, a judgment.

We regard the discharge, therefore, as one obtained after the judgment of the Court was pronounced, but prior to the time when the formal entry of it was made. There can be no doubt on well settled authorities, that a discharge obtained after judgment may be set up in bar of any action upon the judgment itself, and may be employed to vacate the execution issued upon the judgment; but inasmuch as no execution could be issued in this State upon a judgment obtained in the Superior Court, named, a discharge could be

urged in an action on the judgment in this State, as a defence in an action brought upon the judgment itself.

It may be said, in addition, that five days only elapsed between the time when the discharge was obtained and the entry of the judgment, and this did not constitute such laches as to deprive the defendant of the benefits of his discharge.

For these reasons we think the judgment should be reversed and a new trial granted, with costs to appellant to abide the event."

The Court of Appeals took a different view of the matter on the assumed authority of Webb vs. Buckelew 82 N. Y. 555. But the only thing that was decided in that cause was that an interlocutory order was not conclusive evidence of the facts therein recited.

In Webb vs. Buckelew, The Court further says: (p. 560) "Until final judgment is reached the proceedings are subject to change and modification, are imperfect and inchoate and avail nothing as a bar or as evidence until the judgment with its verity as a record settles finally and conclusively the questions at issue." Now the questions at issue in the action in Massachusetts are set forth on pp. 12 and 14, of the Record and on p. 14, it further appears that these questions were settled in the then plaintiff's favor on January 25th, 1875, and that April 1st, 1875, the Superior Court, in view of the settlement of the questions at issue which had taken place in January, decreed certain relief, namely that "said Revere Copper Company do recover of said Dimock," a certain sum of money. As to what, if anything, had occurred between January 25th, when the Revere Co. might have entered judgment and April 1st, when they did enter judgment the judgment record makes no mention.

It was not one of the questions litigated in the action and whose verity is established by the judgment record.

In an action upon a judgment of a sister State, "it is not the particular relief that was granted that affects the parties litigating in

the Courts of this State—it is the adjudication and determination of the facts by that Court"—that is of consequence.

The relief granted by the Massachusetts Court had no extra territorial efficacy, but the conclusive settlement of the matters litigated was effectual everywhere.

Dobson vs. Pearce, 12 N. Y. 156, 167.

This adjudication and determination of the facts in Mr. Dimock's case took place January 25th, 1875, when his default was taken.

This default was in effect a confession by him of all the material and traversable allegations in the declaration, the denial of which would have called for proof on part of the plaintiffs.

Huntress vs. Effingham, 17 N. H. 584.
Bates vs. Loomis, 5 Wend. 134.

Among those facts was not involved the question of a discharge in bankruptcy; it did not then exist.

Jarvis vs. Blanchard, 6 Mass. 4.
Huntress vs. Effingham 17 N. H. 584.

There are decisions which hold that a discharge in bankruptcy to be effectual must be pleaded in the suit pending on the original claim.

Some of these are cited in the opinion of the New York Court of Appeals (Record page 6) and others are.

Bradford vs. Rice, 102 Mass. 472.
Palmer vs. Merrill. 57 Maine 26.
Hollister vs. Abbott 31 N. H. 442.
Bellamy vs. Woodson, 4 Geo. 175.
Rees vs. Butler, 18 Mo. 173.

But all the decisions upholding such a doctrine will be found to be either, 1. Rendered in states wherein the law is that a judgment is a new debt and not merely a new form of an old debt.

2. Rendered in suits which arose under the Bankruptcy Acts of 1811 or 1841.

Now there is a vitally important difference between the effect of a discharge in bankruptcy under the acts of 1811 and 1841 and that of one obtained under the act of 1867.

Under the act of 1867 section 5119, "the certificate of discharge shall be conclusive evidence in favor of the bankrupt of the fact and regularity of such discharge."

A discharge granted under this act cannot be impeached in a state Court.

Ocean Bank vs. Olcott, 46 N Y. 12.

Under the Acts of 1811 and 1841 the discharge could be impeached in a State Court and *this was the reason* why it was held that its merit must be determined in the action brought on the original claim and that it could not be used in bar of a suit on a judgment.

Alcott vs. Avery, 1 Barb. Ch. 347.
Cable vs. Cooper, 15 John 152, 155.

III.

By section 5119 of the Bankruptcy Act of 1867 a discharge is made a bar to all suits upon a provable claim.

Under this Act therefore two courses were open to a bankrupt

against whom a suit was brought upon such a claim during the pendency of the bankruptcy proceedings.

1. He might under section 5106 enjoin the prosecution of the suit until he obtained his discharge and then plead this discharge in bar of the pending suit.

2. He might defend the action on the merits or allow it to go by default.

In the latter event the "provable claim" would ripen into a judgment which conclusively settled against the bankrupt all the issues involved therein, and which would be collectable by execution or any other method *that did not require a suit.*

But if suit was brought to collect the judgment then under section 5119 the bankrupt could plead his discharge in bar of that suit.

This is precisely what the plaintiff in error did.

The record shows that in 1874, while temporarily residing in Massachusetts, he was adjudicated an involuntary bankrupt, and also that he was then and there sued on a "provable claim" by the defendants in error.

That he employed counsel and interposed a substantial defence.

That in January 1875 defendants in error obtained judgment by default.

That they did not enter this judgment until just after he obtained his discharge.

That four years thereafter they began suit in New York on their judgment. A judgment that by New York law was nothing more than the "provable claim" in a new form.

That to the suit on this judgment the plaintiff in error promptly pleaded that discharge in bankruptcy which he did not possess when his default was taken in January, 1875.

This discharge was a complete bar to the suit on the judgment.

Anderson vs. Anderson, 95 Georgia, 518.
S. C. 38 Amer. Rep. 797.
Braman vs. Snider, 21 Feb. Rep. 871.
Clark vs. Rowling, 3 N. Y., p. 222.

IV.

The judgment should therefore be reversed.

GEO PUTNAM SMITH,
For Plaintiff in Error.

117-559

MAR 18 1886

October Term, 1885. No. 185.

SUPREME COURT OF THE UNITED STATES,

ERROR TO THE SUPREME COURT OF NEW YORK.

ANTHONY W. DIMOCK,

Plaintiff in Error,

against

THE REVERE COPPER COMPANY OF BOSTON,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

DAVID WILLCOX,

Of Counsel,

20 NASSAU STREET, N. Y.

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Supreme Court of the United States,

ERROR TO THE SUPREME COURT OF NEW YORK.

ANTHONY W. DIMOCK,
Plaintiff in Error,
AGAINST
REVERE COPPER COMPANY OF BOSTON,
Defendant in Error.

Brief for Defendant in Error.

STATEMENT.

On January 13, 1874, the Revere Copper Company began, by personal service, an action against Anthony W. Dimock in the Superior Court of Massachusetts upon an endorsement by him of certain notes (fols. 39–40). On June 23, 1874, Dimock was duly adjudicated a bankrupt. On March 26, 1875, he was discharged from all debts provable at the date of the adjudication. On April 1, 1875, the Copper Company recovered judgment against him for $3,595.15 (fol. 40).

On March 3, 1879, the Copper Company brought this action in the Supreme Court of New York upon that judgment. The trial was by the court. It found the above facts (fols. 39, 40), and held that the discharge in bankruptcy was no defense (fols. 44, 46). The Copper Company, accordingly, recovered judgment, on October 22, 1879, for $4,908.73 (fol. 41).

This was affirmed by the Court of Appeals (fols. 25, 26; 14–21; 90 N. Y., 33), and judgment of affirmance was entered in the Supreme Court (fol. 57). To that judgment the present writ of error was sued out (fols. 1, 2). Its ground is that the defendant claimed and set up a right, privilege and immunity under a statute of the United States, and the decision was against such right, privilege or immunity (fol. 1).

The judgment of the Massachusetts court is conclusive against any matter of defense existing prior to April 1, 1875, the date of its recovery.

The fact that, during the pendency of the suit, the defendant was adjudicated a bankrupt in no respect impairs the validity or force of the judgment.

Eyster vs. Gaff, 91 U. S., 521.
Claflin vs. Houseman, 93 U. S., 130.
McHenry vs. La Société, 95 U. S., 60.
Davis vs. Friedlander, 104 U. S., 570.
Thatcher vs. Rockwell, 105 U. S., 467;

Wherever that judgment may be asserted it is alike final upon the merits.

Mills vs. Duryee, 7 Cranch, 481.
Hampton vs. McConnel, 3 Wheat., 234.
Christmas vs. Russell, 5 Wall, 290.
Dobson vs. Pearce, 12 N. Y., 156.
Hatcher vs. Rocheleau, 18 N. Y., 86.
Patrick vs. Shaffer, 94 N. Y., 425.

And it speaks and concludes the parties as of April 1, 1875, the date of its recovery (fol. 16). A judgment "is a finality as to the "claim or demand in controversy, concluding parties and those in "privity with them, not only as to every matter which was offered "and received to sustain or defeat the claim or demand, but as "to any other admissible matter which might have been "offered for that purpose. If defenses were not presented in "the action, and established by competent evidence, the "subsequent allegation of their existence is of no legal consequence. "The judgment is as conclusive, so far as future proceedings at "law are concerned, as though the defenses never existed. (Cromwell vs. County of Sac, 94 U. S., 357).

Jordan vs. Van Epps, 85 N. Y., 427, 436.

That is to say, the judgment is conclusive against all possible defenses existing at the time of its recovery. The date as of which the judgment speaks is not that of any interlocutory step in the action. It is the date of the recovery of the judgment itself.

"It is a settled rule that the defendant cannot plead any matter to a *sci.* "*fa.* on a judgment which he might have pleaded to the original action, *or* "*which existed prior to the judgment.*

McFarland vs. Irwin, 8 Johns, 77.

"The rule is well settled that no matter of defense which existed anterior "to the *recovery* of the judgment can be pleaded or shown as a defense to an "action upon the judgment."

Sternbergh vs. Schoolcroft, 2 Barb., 153.

In Smith vs. Nelson, 62 N. Y., 286, the suit was to set aside a judgment for fraud. The court said, " it is not sufficient to authorize the interference " of the court, that it is shown that the claim upon which the judgment was " obtained was unfounded, or that there was a good defense to the action, or " that the court erroneously decided the law, or that the defendant omitted " to avail himself of his defense, if *before the judgment was rendered* the facts " were known or might by reasonable diligence have been ascertained by " him."

Rees vs, Butler, 18 Mo., 174.
Bird vs. Smith, 34 Mo., 63.
Freeman on Judgments, Sec. 435.

Then and not until then are the rights of the parties in the premises conclusively adjudicated.

Smith vs. McCool, 16 Wall, 560.
Webb vs. Buckalew, 82 N. Y., 555, 559.

Some importance is claimed for the fact appearing in the evidence that the defendant's default in the Massachusetts case was taken prior to the date of his discharge in bankruptcy (fol. 37). Neither the default nor its date were pleaded or found as facts (fols. 39, 40). They will not, therefore, be considered by this court for the purpose of reversing the judgment.

Boggs vs. Mining Co., 3 Wall., 304.
Republican Bridge Co. vs. Railway Co., 92 U. S.. 315.

And, as has just been seen, the default is not the adjudication now relied upon. That arises only by virtue of the judgment (fol. 16). Prior thereto there is no adjudication (Smith vs. McCool, 16 Wall., 560).

The granting of the discharge in bankruptcy prior to the recovery of the judgment, therefore, constitutes no defense.

Even when a defendant is discharged during the pendency of an action and before judgment he has no absolute right to set up the discharge by supplemental answer. It is discretionary with the court. And in case of laches or other sufficient grounds for refusal, leave to do so will not be granted.

Medbury vs. Swan, 46 N. Y., 200.
Holyoke vs. Adams, 59 N. Y., 233.
McDonald vs. Whitney, 12 Hun, 95.

Much less is such a discharge a defense to an action upon a judgment recovered thereafter. For the judgment is a conclusive adjudication as of a date subsequent to the discharge. The effort to

set up the discharge by way of defense amounts merely to a claim that when the judgment was recovered there was a good defense. That is the entire scope of the argument now made for the plaintiff in error. But this is manifestly a collateral attack. The authorities are, therefore, conclusive that a discharge before judgment constitutes no defense in an action on the judgment.

In Bridges vs. Armour, 5 Howard, 91, one of the plaintiffs had been discharged. The question was whether he was a competent witness for the other plaintiffs. This court said: "this suit was pending at the time he was "declared a bankrupt and obtained his discharge; and it is quite clear if the "defendants had eventually succeeded the discharge would not have been a "bar to his liability for the costs of the suit. The judgment would have "been a debt accruing subsequent to the discharge, which could not have "been proved under the act."

In Mechanics' Bank vs. Hazard (9 Johns., 392), judgment was recovered after a discharge in insolvent proceedings. It was held that the judgment was valid notwithstanding the discharge.

In Steward vs. Green (11 Paige, 535, 537) plaintiff had recovered judgment at law subsequent to a discharge in bankruptcy, in an action which was pending prior thereto. This was a creditor's suit, based upon that judgment. The defendant set up the discharge. The court said: "the discharge of the "defendant, under the bankrupt act, more than a month before the recovery "of the judgment against him, cannot avail him in this court, while that "judgment remains in full force. * * * The case of the "Mechanics' Bank vs. Hazard (*supra*) shows that if the defendant wishes to "avail himself of a discharge which had been obtained before judgment "against him, he should have applied to set up his discharge, as a defense, in "the supreme court. And having neglected to do so, this court cannot "grant him relief, while the judgment, recovered against him subsequent to "the discharge, remains in full force." This case is approved in Clark vs. Rowling, 3 N. Y., 224, (see fol. 44).

In Rudge vs. Rundle (1 Thompson & Cook, N. Y. Supreme Court, 649) judgment was recovered subsequent to the discharge. It was held that the judgment was valid, and, as defendants had been guilty of *laches* in not setting up the discharge before judgment, a motion for leave to be allowed to plead it thereafter was denied. The court said: "it has been the uniform course of "decision, both in regard to insolvent and bankrupt discharges, that the "debtor must plead his discharge when he has the opportunity; and if he "omits to plead his discharge, the court will not relieve him on motion."

In Hollister vs. Abbott (31 N. H., 442) a suit was commenced in a state court, and the defendant subsequently applied to the District Court for a discharge in bankruptcy. Before the discharge was granted he was defaulted in the suit, and the cause was continued for judgment, which was rendered after the discharge was granted. An action was then brought upon the judgment, and defendant pleaded the discharge in bar. The facts, therefore, were precisely the same as in the present case. The court, after stating very strongly the doctrine of *res adjudicata*, said (p. 449): "It appears to us, then, very "clear, that the judgment upon which this suit was brought cannot be ques- "tioned in the manner contended for by the defendant. The court had jur- "isdiction both of the subject matter and of the parties. They had the

"power to continue the action for judgment after the default. Such is the "very common practice in this state, and if the defendant had wished the "judgment to be entered up against him so as to have it in a situation to be "proved under the commission, the court would probably have so ordered; "or would have permitted the default to have been stricken off to let in the "plea of bankruptcy *puis darrein*. The court would not have dismissed the "action upon the filing of the petition in bankruptcy, for they could not "know that anything further would be done in the matter, or that any certifi-"cate would ever be obtained. Such a proceeding does not deprive the "court of jurisdiction (Hobart vs. Haskell, 14 N. H., 127). * * * "This defendant made no attempt to have the judgment vacated, nor did he "take any steps to relieve himself from its full force. It has been suffered "to stand for years as a judgment regularly obtained against him after his "discharge in bankruptcy, and it cannot now be defeated by a state of facts "which, if timely interposed, might have been successful." This case is cited in Christmas vs. Russell, 5 Wall., 290, 307.

In Bellamy vs. Woodson (4 Geo., 175) the facts were identical with those in the last case. It was held that the judgment was valid, and would not be annulled by a court of equity.

In Rees vs. Butler (18 Mo., 173) the suit was upon an Ohio judgment, entered after discharge in bankruptcy, in a suit pending prior thereto. The court held that a defense to an action on a judgment, whether of that state or another state, must be confined to matters accruing since its rendition.

Post vs. Riley, 18 Johns., 54.
Desobry vs. Morange, 18 Johns., 336.
Alcott vs. Avery, 1 Barb. Ch., 349.
Lee vs. Phillips, 6 Hill, 246.
Wilkins vs. Warren, 20 Me., 438.
Wells vs. Edmison, Supreme Court of Dakota, 22 N. W. Rep., 497.

No authority to the contrary can be found. Cases holding that a judgment recovered prior to a discharge is barred by the discharge have no present application. The extent of the decision there is merely that the judgment is not a new debt in such sense as not to be discharged. As the discharge is subsequent to the judgment there is no question of collateral attack. Such cases are Graham vs. Pierson (6 Hill, 247); Clark vs. Rowling (3 N. Y., 46); Monroe vs. Upton (50 N. Y., 583); Braman vs. Snider (21 Fed. Rep., 871). It may be observed, too, that there are many cases holding the contrary doctrine.

In re Gallison, 3 N. B. R., 353.
In re Mansfield, 6 N. B. R., 388.
Holbrook vs. Foss, 27 Me., 441.
Pike vs. McDonald, 32 Me., 418.
Bradford vs. Rice, 102 Mass., 472.
Culter vs. Evans, 115 Mass., 27.
Ray vs. Wright, 119 Mass., 426.
Steadman vs. Lee, 61 Georgia, 58.
Bowen vs. Eichel, 91 Ind., 22.
Boynton vs. Ball, 105 Ill., 627.
Wells vs. Edmison, Supreme Court of Dakota, 22 N. W. Rep., 497.

It is clear, therefore, that the discharge in bankruptcy is no bar to this action upon the judgment.

This conclusion works no hardship to defendant.

The regular and orderly remedy has always been open to him. This is to move for pr per relief in the action in which the judgment was recovered, thus avoiding collateral attack thereon.

Alcott vs. Avery, 1 Barb. Ch., 347.
Graham vs. Pierson, 6 Hill, 247.
Cornell vs. Dakin, 38 N. Y., 253.
Medbury vs. Swan, 46 N. Y., 200.
Monroe vs. Upton, 50 N. Y., 593.

But the present defense is an attempt to take as a right what is purely a matter of favor (*supra*, p. 3), namely relief against a judgment recovered subsequently to a discharge. Nor can this defense be deemed equivalent to a suit in equity to cancel the judgment. Such a suit would be a direct proceeding. But here the discharge is relied upon not as a ground for relief in equity against the judgment, but as a bar to its enforcement. This is obviously a collateral attack. Still further, in the language of the Court of Appeals, in such "an action (defendant) would "have been obliged to prove fraud, imposition, mistake, or some "other ground for equitable interference (Smith vs. Nelson, 62 N. Y., "286). It would not have been sufficient for him to show that the "debt for which the judgment was entered had been discharged, or "that the judgment was unjust, but he would have been obliged to "excuse his omission to avail himself of his defense, and to move "for relief in the original action, and relief would have been admin-"istered to him, if at all, in view of all the circumstances, and "based upon the grounds which authorize equitable interference in "such cases. And the defendant, under our system of practice, in-"stead of commencing such an action against the plaintiff, could "have claimed the same relief in this action. But he would, in "that case, have been obliged to allege in his answer, and prove "the same facts which he would have been required to allege and "prove, if he had instituted an action for the same relief. Here no "such relief was sought. The discharge was relied upon simply as a "defense to the action, and no facts were alleged or proved which

" entitled the defendant to equitable relief against the judgment " (fols. 19, 20).

In any event defendant has been guilty of such laches as to disentitle him to any relief. (1) He omitted to obtain any stay from the bankrupt court between the adjudication upon June 23, 1874, and the discharge upon March 26, 1875. During this time his default was taken in the state court. (2) He omitted to apply to that court for leave to set up his discharge, between March 26, 1875, when it was obtained, and April 1, 1875, when judgment was entered. He was bound to know the position of the suit and then had his day in court (Bellamy vs. Woodson, 4 Ga., 175–181; Sailesbury vs. Creswell, 14 Hun, 460). (3) He omitted to make any movement whatever in the court rendering the judgment during the four years which elapsed between the rendition thereof and the beginning of this action (Sandford vs. Sinclair, 3 Denio, 269; Henderson vs. Savage, 14 Jones & Spencer, 231; Holyoke vs. Adams, 59 N. Y., 233, 236). No effort whatever is made to excuse these various acts of laches.

The judgment was right and should be affirmed.

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